

**Case C-427/23****Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

11 July 2023

**Referring court:**

Szegedi Törvényszék (Hungary)

**Date of the decision to refer:**

3 July 2023

**Applicant:**

Határ Diszkont Kft.

**Defendant:**

Nemzeti Adó—és Vámhivatal Fellebbviteli Igazgatósága

**Subject matter of the main proceedings**

Judicial review proceedings against the decision of the Nemzeti Adó—és Vámhivatal Fellebbviteli Igazgatósága (Appeals Directorate of the National Tax and Customs Authority, Hungary) upholding the decision of the first-instance tax authority in which an activity relating to refunds of value added tax (VAT) in respect of supplies of goods by the applicant was classified by that authority as a separate transaction and, accordingly, subject to VAT.

**Subject matter and legal basis of the request**

The referring court enquires, under Article 267 TFEU, whether the following are in conformity with EU law, and in particular with Directive 2006/112/EC: (a) the practice of a Member State whereby an activity relating to refunds of VAT to foreign travellers is considered to be a separate supply of services on which VAT must be charged in accordance with the general rules; (b) the practice of a Member State whereby the fee for administering VAT refunds is not considered to be exempt from tax; (c) the practice of a Member State according to which the

corresponding VAT must also be paid retroactively on the administration fee; and (d) the practice of a Member State whereby the amount shown as exempt on the invoices issued for the administration fee is used as the taxable amount for VAT.

### Questions referred for a preliminary ruling

1. Is the practice of a Member State according to which the administration of VAT refunds to foreign travellers – which includes the administrative procedures from the time the standard forms for applying for the refund of VAT are submitted up to the refund of the tax – is considered to be a separate supply of services distinct from the tax-exempt supply of goods, on which VAT must be charged and paid in accordance with the general rules, compliant with Article 1(2), Article 2(1)(c), Article 78 and Article 146(1)(e) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax ('the VAT Directive') in a situation in which the administration fee, which is a percentage of the VAT to be refunded, is received and invoiced simultaneously with the VAT refund, at a time different from the supply and invoicing of the goods and after the customer has paid the consideration for the goods and those goods have exited for a third country?
2. In the event that the answer to the first question is in the affirmative, is Article 135(1)(d) of the VAT Directive infringed by the practice of a Member State whereby the fee charged for administering refunds of the VAT arising on the supply of goods to foreign travellers is not considered to be exempt from VAT as a 'transaction concerning payments or debts'?
3. In the event that the answers to the first and second questions are in the affirmative, is the practice of a Member State compliant with the principle of the protection of legitimate expectations as one of the fundamental principles of the common VAT system where, according to that practice, the issuer of the invoices for the administration fee must also pay VAT retroactively even though the tax authority had already audited that person on various occasions in the years prior to the inspection and during those audits had examined the issuer's practice of considering the administration fee to be exempt from VAT and had not raised any objection or informed the issuer of any change in the Member State legislation in force until 31 December 2007, which expressly included 'refunds of the tax to foreign travellers processed by the trader under specific legislation' as services exempt from tax?
4. In the event that the answers to the first to third questions are in the affirmative, is the practice of a Member State tax authority compliant with Articles 73 and 78 of the VAT Directive where it consists of using as the taxable amount for VAT the consideration shown as exempt on the invoices issued for the administration fee and where, according to the tax authority's

decision, the issuer of the invoices must pay VAT on that taxable amount in accordance with the general rules, even though the consideration paid by the foreign travellers does not include that amount?

### **Provisions of European Union law and case-law relied on**

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax: Articles 1(2), 2(1) and 24(1), Articles 73 and 78 and Articles 135(1) and 146(1)

### **Case-law of the Court of Justice relied on**

Judgments of 6 October 2005, *MyTravel* (C-291/03, EU:C:2005:591); of 14 September 2006, *Elmeka* (C-181/04 to C-183/04, EU:C:2006:563); of 2 December 2010, *Everything Everywhere* (C-276/09, EU:C:2010:730); of 7 November 2013, *Tulicã and Plavošín* (C-249/12 and C-250/12, EU:C:2013:722); of 15 May 2014, *Almos Agrárkúkereskedelmi* (C-337/13, EU:C:2014:328); of 10 November 2016, *Baštová* (C-432/15, EU:C:2016:855); and of 8 November 2018, *Cartrans Spedition* (C-495/17, EU:C:2018:887)

### **Provisions of national law relied on**

Általános forgalmi adóról szóló 2007. évi CXXVII. törvény (Law No CXXVII of 2007 on value added tax, 'the Law on VAT')

According to Paragraph 70(1), in the case of supplies of goods and services, the basis of assessment shall include:

' ...

- (b) incidental expenses which the supplier of goods or services charges to the acquirer of the goods or recipient of the services, in particular: expenses and costs connected with commission or any other type of intermediation ...'.

Under Paragraph 86(1) of the Law on VAT, the following are exempt from VAT:

' ...

- (d) supplies of services, including negotiation, concerning payments, transfers, cheques and other pecuniary claims and financial instruments but excluding the collection of debts (accounts receivable) itself;
- (e) supplies of services, including negotiation, concerning Hungarian or foreign legal tender ...'.

According to Paragraph 98(1) of the Law on VAT, ‘supplies of goods by post or transported from a country to a country outside the European Community shall be exempt from tax provided that the posting or transport:

- (a) is carried out by the supplier himself or by a third party acting on behalf of the supplier;
- (b) is carried out by the purchaser himself or by a third party acting on behalf of the purchaser where the additional conditions provided for in Paragraph 98(3) and (4) and in Paragraphs 99 and 100 of the present law are satisfied.’

According to Paragraph 99(1) of the Law on VAT: ‘Where the purchaser is a foreign traveller and the goods supplied ... form part of that person’s personal luggage or traveller’s luggage, in order for the exemption provided for in Paragraph 98(1) to apply:

...

- (b) the foreign traveller must demonstrate that status by means of a form of identification consisting of his or her valid travel documents or other valid official documents ...;
- (c) at the point of exit from the Community, the authority must certify that the goods have left the territory by endorsing and stamping the form provided for that purpose ... and the goods must be presented simultaneously with the original invoice which confirms that the goods have been supplied.

(2) In order to qualify for the exemption, the seller of the goods must, in addition to issuing an invoice, complete a tax refund application form when asked to do so by the foreign traveller.

...

(4) Exemption from tax shall be subject to the condition that:

...

(b) where the tax was charged at the time the goods were supplied, the seller shall refund the tax to the foreign traveller in accordance with Paragraphs 5 to 8.

(5) The foreign traveller him or herself or the agent acting on behalf of the traveller may apply to the seller of the goods for a refund of the tax.

...

(8) The seller of the goods must also ensure that the invoice proving that the goods have been supplied does not give rise to a further application for a tax

refund. The seller must therefore, before returning the original of the invoice [to the traveller], mark it with the note ‘VAT paid’ and make a photocopy of the invoice including that note; the photocopy must be retained in the seller’s records.’

According to Paragraph 102(1) of the Law on VAT: ‘Supplies of services, excluding those that are exempt under Paragraphs 85(1) and 86(1), shall be exempt from the tax when they are directly connected with goods

...

(b) under the exportation scheme that exit from Community territory where that exit is certified by the authority within the meaning of Article 98(2)(a)’.

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 In 2020, at its commercial premises near the border between Hungary and Serbia, the applicant sold a large number of various goods to foreign travellers resident in Serbia and refunded the VAT on the sales, which totalled HUF 298 328 000. For processing the VAT refund, it charged the foreign travellers who had purchased the goods an administration fee of 15% of the VAT refunded. In its VAT returns the applicant included the turnover from the administration fee as an exempt public interest or other special service.
- 2 According to the stamped tax refund application forms, the foreign travellers took the goods acquired out of Hungarian territory on the date of the sale; the invoices were marked ‘VAT paid’. Subsequently to the exportation, the applicant refunded to the foreign travellers the full amount of the VAT charged and shown on the invoices. On the date on which the VAT was refunded, the applicant issued invoices for cash payment in respect of the 15% administration fee and payment of that amount was evidenced by till receipts. The invoices for cash payment included the expression ‘administration fee’ as the transaction name.
- 3 In the context of an inspection carried out for the 2020 period in relation to VAT, among other matters, on several occasions the first-instance tax authority requested the applicant to indicate the actual content of the invoices issued for the administration fee. In its statements, the applicant maintained at all times that the supply of services at issue was exempt from tax, but changed its mind a number of times as to what constituted the ground for that exemption.
- 4 It is clear from the applicant’s statements that it classified the service incorrectly in statistical terms.
- 5 Before the inspection, the applicant had asked the Nemzeti Adó—és Vámhivatal Központi Irányítás Ügyfélkapcsolati és Tájékoztatási Főosztálya (Central Directorate of the National Tax and Customs Authority, Taxpayer Relations and Information Department, Hungary) whether an administration fee relating to VAT

refunds was exempt where it was not received at the time of the purchase. In its reply, the aforementioned department explained that an administration fee is an expense incidental to the supply of goods and must be invoiced as exempt from tax to the foreign traveller who acquires the goods, provided the requirements are satisfied for the underlying transaction to be exempt from tax.

- 6 The applicant contended that the amount of VAT should not be determined on the basis of the net amount invoiced and claimed that the income received as administration fees also included the VAT amount.
- 7 In its decision of 22 July 2022, the first-instance tax authority declared a tax difference payable by the applicant, constituting a ‘tax shortfall’ of HUF 12 040 000. According to the decision, the above-referred activity of the applicant was not an accounting service but was purely administrative, and the applicant had not demonstrated that the administration service was exempt from VAT. The first-instance tax authority underscored that the applicant itself treated the administration service as a separate supply of services and that it did not include it in the taxable amount of the supply of goods or give the date on which the goods were supplied as the date on which the service was performed.
- 8 The applicant brought an administrative action against that decision before the defendant authority, which, by a decision of 27 October 2022, confirmed the decision of the first-instance tax authority. The defendant submits that the information previously requested by the applicant related to a question that the applicant had posed in extremely broad terms, in which it did not mention the essential facts that, in the specific case of the applicant, the supply of goods and the provision of the service were completely separate from each other and did not occur at the same time; that the service provided was not a requirement for claiming a VAT refund; and that the foreign travellers did not even request such a service.
- 9 The applicant has brought judicial review proceedings before the referring court against that decision.

### **The essential arguments of the parties in the main proceedings**

- 10 The **applicant** argues that the administration fee at issue is exempt from VAT under Article 102(1)(b) of the Law on VAT as a supply of services directly connected with goods whose departure from the Community has been certified by the tax authority. The administration fee is an expense directly incidental to the VAT-exempt supply of goods and is, therefore, exempt from VAT.
- 11 The applicant states that, as seller, it sold the goods to foreign travellers (purchasers), that the purchasers paid consideration for those goods and it undertook to reimburse them for the VAT corresponding to the consideration paid for the goods if the foreign travellers proved, by presenting the tax refund application form, that the goods had exited from the territory of the Community,

provided that they paid it 15% of the refunded VAT by way of an administration fee. The term relating to the administration fee therefore formed an integral part of the sale and purchase agreement.

- 12 According to the applicant, the VAT refund was in essence taken into account in determination of the final purchase price, and the provisions of the sale and purchase agreements referred to in these proceedings were fully performed when the VAT was refunded. The Law on VAT contains no requirement that the events must occur simultaneously.
- 13 The applicant relies on the judgment in Case C-432/15, *Baštová*, which supports the interpretation according to which, in the present case, the supply of goods is the principal service and the administration service provided in relation to the VAT refund is regarded as an expense incidental to that service.
- 14 The applicant submits that the tax authority infringed the principle of the protection of legitimate expectations repeatedly enshrined in the Court's case-law, because on four occasions in the years preceding the inspection it had examined the VAT levied on the applicant and had found that the administration fee was treated as income exempt from VAT and that it was furthermore invoiced as such. In the event that none of the grounds for exemption on which the applicant relies was applicable, the defendant authority, by virtue of the principle of the protection of legitimate expectations, would not be able to claim retroactively the payment of VAT not previously charged by the applicant either.
- 15 The applicant has proposed that a reference be made for a preliminary ruling seeking an answer to four questions.
- 16 According to the **defendant authority**, the legal obligation on a trader who sells to foreign travellers to refund the VAT on goods that exit from the territory via the customs border, where the legal requirements are satisfied, is considered to be a supply of services only by the applicant, and in the view of that authority, since the supplies of goods are fully performed where that service is not supplied, under no circumstances is this a matter of a 'supply of services relating to' those supplies of goods. In its view there is in the present case no substantive legal rule establishing that the supply of services in question is exempt from tax.
- 17 In the pre-litigation procedure, the applicant did not plead that sale and purchase agreements of any kind had been concluded with the foreign travellers that were its customers. The supply of services was based on a unilateral decision by the applicant without being requested by the customers and, in essence, the applicant supplied the service as a requirement for the tax refund.
- 18 The circumstance that the amount actually paid in consideration for the goods varied subsequently as a result of the VAT refund does not alter the fact that the purchasers paid the consideration at the time of purchase. The supply of goods became fully performed as a result of the fact that the customers paid the

consideration, took possession of the goods and moved them to a third country, thereby completing the transaction.

- 19 The defendant authority does not believe that the referral for a preliminary ruling is justified.

**Succinct presentation of the reasoning in the reference for a preliminary ruling**

- 20 In these proceedings, the referring court is required to rule on the question, which calls for the interpretation of EU law, of whether a VAT refund that is processed in exchange for an administration fee is ancillary to a tax-exempt supply of goods to foreign travellers and must therefore be considered to be an exempt supply of services, or must be considered to be a separate, and in consequence taxable, supply of services.
- 21 In respect of the first question referred, the referring court is of the view that the administrative procedure at issue is a supply of services ancillary to the exempt supply of goods and, since the supply of goods to a foreign traveller constitutes an exportation of goods, it is also a supply of services directly connected with that exportation of goods, and is therefore exempted from VAT under Article 146(1)(e) of the VAT Directive.
- 22 As regards the considerations concerning proof of the exemption, the referring court considers that the Court of Justice has already ruled on the matter to the effect that the nature of the activity objectively determines whether there is an exemption on grounds of exportation, and that this is also true of a supply of services directly connected with the exportation of goods.
- 23 In so far as concerns the second question referred, the referring court notes that, if the tax authority was correct to find that the supply of services at issue was a separate supply of services, it must decide whether that supply of services is exempt from tax on any ground.
- 24 Article 86(1)(d) of the Law on VAT, which is the Hungarian provision transposing Article 135(1)(d) of the VAT Directive, lists the financial services that are exempt from VAT, and the question seeks clarification of whether the service provided by the applicant – relating to the pecuniary claim of its customers, who are foreign travellers, to be refunded VAT – qualifies to be exempt from tax on that ground. It falls to the Court of Justice to interpret the provision of the VAT Directive.
- 25 The applicant relies on the judgment in *Elmeka* (Cases C-181/04 to C-183/04) in relation to the principle of the protection of legitimate expectations. It is apparent from that judgment that the referring court must determine whether, on the basis of the findings of the earlier tax audits, the applicant could reasonably have believed that the supply of services at issue was exempt from tax.

- 26 In view of the position maintained during the tax audits, which is clearly apparent from the audit records and has remained unchanged over the years, according to which the applicant had lawfully issued VAT-exempt invoices for the administration service, the referring court is uncertain whether the EU law principle of the protection of legitimate expectations is complied with in a situation where the applicant is required to pay VAT, including retroactively, in respect of the same transaction, without the tax authority having informed the applicant in advance that it had changed its earlier position.
- 27 In respect of the method of calculating the amount of VAT, the referring court cites the judgments in *MyTravel* (C-291/03) and *Almos Agrárkúlforgalmazási* (C-337/13). According to that case-law, it is contrary to the fundamental principles of the VAT system to oblige the applicant to pay an amount of VAT that it has not received from the final consumers.
- 28 Since it is manifestly impossible for the applicant, after the event, to charge its customers, foreign travellers, the VAT that the tax authority has determined it must pay on the administration fee, on the basis of the Court's case-law cited above, the referring court also finds the tax authority to have acted questionably when it considered the administration fee to be a net quantity instead of considering it as a gross quantity that also included VAT.
- 29 In consequence, according to the referring court, as a result of the tax authority's decision, the applicant is obliged to pay VAT that it cannot charge, a situation that is contrary to the fundamental principle according to which VAT is to be borne by the final consumer.